TARGET TERM SDN BHD v. WALDORF AND WINDSOR MANAGEMENT CORPORATION & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
CHE MOHD RUZIMA GHAZALI JCA
AZIZUL AZMI ADNAN JCA
[CIVIL APPEAL NOS: W-02(NCVC)(W)-1890-10-2021
& W-02(NCVC)(W)-1929-10-2021]
4 OCTOBER 2024

Abstract – *(i) The act of letting out a carpark unit as part of a business merely amounts to a licence to the carpark customer to use a unit of carpark, it does not amount to an act of dealing in the accessory parcels comprising the carpark units. In such situation, there is no contravention of the prohibition against independent dealing of accessory parcels contained in ss. 34(2) and 69 of the Strata Titles Act 1985; (ii) There is nothing in the scheme of the applicable legislation to suggest that a proprietor and a management corporation can contract out of the obligations imposed by written law. As such, a proprietor is not permitted to circumvent a liability that has been imposed by statute.*

LAND LAW: *Management corporation – Billing of arrears in management charges and sinking fund contributions – Use of car park accessory parcels – Whether contravened ss. 34 and 69 of Strata Titles Act 1985 – Whether carpark units common property – Innab Salil v. Verve Suits Mont' Kiara Management Corporation*

LAND LAW: *Management corporation – Billing of arrears in management charges and sinking fund contributions – Car park accessory parcels – Imposition of charges – Whether management corporation has legal entitlement to claim for contributions to maintenance account and sinking fund – Whether charges imposed in proportion to share units or provisional share units held by respective proprietors – Whether proprietor and management corporation can contract out of obligations imposed by written law – Strata Titles Act 1985 – Strata Management Act 2013*

There were two appeals before the court. The appellant in Appeal 1929, Malaysia Land Properties Sdn Bhd ('Mayland'), was the developer of a mixed development complex, within which were comprised the Waldorf & Windsor Towers apartments. In 2009, Mayland entered into a sale and purchase agreement ('SPA') to sell to Target Term Sdn Bhd ('Target Term') one of the apartment units, unit B-21-03, which sale included 420 carpark units. Target Term was the appellant in Appeal 1890. The intent of the sale to Target Team of the single apartment unit together with the 420 carpark

A units was in furtherance of a plan for Target Term to undertake a commercial carpark business. The strata title to unit B-21-03 was issued to Target Term. In the strata plan, 414 carpark units have been accessorised to the parcel identified as unit B-21-03. The respondent in both appeals was the Waldorf and Windsor Management Corporation ('MC'). In 2017, the MC billed
B Target Term for arrears in management charges and sinking fund contributions amounting to over RM850,000. This prompted Target Term to sue the MC in June 2017. It sought, among others, for a declaration that the back charges were null and void. Target Team's pleaded position was that the MC had not provided any maintenance services in respect of the car park
C accessory parcels, and that all maintenance and other charges had been borne by Target Term. In response, the MC raised a counterclaim against Target Term and against Mayland. It sought to defeat the title of Target Term to the accessory parcels on the basis that (among others) the SPA contravened the applicable provisions of the Strata Titles Act 1985 ('STA 1985'). The High Court dismissed the claim of Target Term in the main action, and allowed
D the counterclaim, declaring, (among others), that the SPA for unit B-21-03 entered into between Target Term and Mayland was null, void and unenforceable and that the 414 carpark units were not accessory parcels but were, in fact and law, common property. The High Court held that (i) the use of the 414 carpark parcels in the commercial carpark business undertaken
E by Target Term contravened ss. 34(2) and 69 of the STA 1985; and (ii) the provision of the STA 1985 required an accessory parcel to be used in conjunction with the parcel to which they had been accessorised (B-21-03) and since they were not used in conjunction with unit B-21-03, this illegality defeated the title of Target Term to the carpark parcels, which in turn meant
F that the carpark units were common property within the meaning of STA 1985. Hence, these appeals.

Held (allowing in part Appeal 1890 and Appeal 1929)
Per Azizul Azmi Adnan JCA delivering the judgment of the court:

G **(1)** The contractual relationship between Target Term as the operator of the carpark and its customers was not intended to confer upon the latter rights and obligations consistent with those of tenants under tenancy laws. The carpark customers were mere licensees and not tenants. This court was bound by the decision of the Federal Court in *Innab Salil v. Verve Suits Mont' Kiara Management Corporation*. It therefore followed
H that the construction of carpark rentals as a 'dealing' could not be correct. The cognate expression 'dealt with' in s. 34(2) and 59 of the STA 1985 does not encompass the act of granting licenses for temporary occupation to carpark customers. Thus, the act of operating a commercial carpark business on the accessory parcels did not constitute
I dealing in those accessory parcels, and accordingly, did not contravene the statutory prohibition in ss. 34(1) and 69 of the STA 1985 against independent dealing of accessory parcels. (paras 20-28)

(2) The certified strata plan clearly showed the 414 carpark units being identified as accessory parcels. Once they have been identified as accessory parcels, they could not in law be construed as common property. This court was unable to conclude that if the accessory parcel had not been used or was not intended to be used with the parcel to which it was appurtenant, then that accessory parcels loses its characterisation as a parcel and becomes subsumed into the common property of the building. First, nowhere in the STA 1985 was this legal consequence provided. Second, it is a fundamental rule of drafting (and consequently of construction) that definitions are not to contain the operative provisions of written law. If rights and obligations are intended to be created or annulled by a provision of law, then it must be set out in the body of the legislation. The phrase 'an accessory parcel which is used or intended to be used in conjunction with a parcel' simply refers to an accessory parcel that has been made appurtenant to a parcel. (paras 32-34)

(3) The development orders issued did not specify any breakdown between the carpark units to be made available for residents and for visitors. Nor was there any requirement imposed on the number of carpark units that were to be made appurtenant to a parcel. There was no contravention of the development orders that had been issued for the development of the subject building. As a consequence, the SPA was not illegal or void, and Target Term's title to the accessory parcel remained unaffected. (paras 38 & 41)

(4) The first general meeting of the MC was held on 23 July 2016. There was thus an obligation on the parcel owners to pay the maintenance charges for the period between 1 June 2015 until 23 August 2016 (being the date one month after the first annual general meeting of the MC). Under s. 52(2) of the Strata Management Act 2013 ('SMA 2013'), the charges ought to have been determined by the developer by reference to the share units held, but, the charges had in fact been imposed on the basis of square footage. The obligation to impose charges on the basis of share units in fact and law lay with Mayland, as the developer. It would not be just to deprive the MC from its legal entitlement by reason of a default of the developer. Target Term was accordingly liable to the MC for (i) contributions to the maintenance account for the period between 1 June 2015 and 23 August 2016; and (ii) contributions to the sinking fund for the same period at the statutorily prescribed rate of 10% of the maintenance charges. (para 66)

(5) For the period after 23 August 2016, the MC would not be entitled to the back charges for the maintenance charges and sinking fund for as long as it had not passed a resolution at a general meeting that conformed

to the requirements set out in s. 60(3)(b) of the STA. This provision is clear in that the MC would only be permitted to impose charges for the purposes of the maintenance account if those charges were imposed in proportion to the share units or provisional share units held by the respective proprietors. While the subsection permits the MC to impose different rates of charges, it does not permit the MC to impose charges on any basis other than share units or provisional share units. The rate of RM0.31/ft previously fixed could not be charged, because this rate would only be applicable in respect of the preliminary management period, in accordance with s. 52(2) of the STA 2013. (paras 68 & 69)

(6) Target Term would not be permitted to circumvent a liability that has been imposed by statute. There was nothing in the scheme of the applicable legislation to suggest that a proprietor and a management corporation can contract out of the obligations imposed by written law. The contention by Target Term that it had undertaken its own maintenance of car park accessory parcels did not obviate its liability to pay for the charges that have been imposed under the STA 1985 and the STA 2013. (para 73)

Case(s) referred to:

Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal [2019] CLJU 894; [2019] 1 LNS 894 CA ***(not foll)***

Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation [2020] 10 CLJ 285 FC ***(foll)***

Muhamad Nazri Muhamad v. JMB Menara Rajawali & Anor [2019] 10 CLJ 547 CA ***(refd)***

Legislation referred to:

Strata Management Act 2013, ss. 12(2), 50(3), 51(2), 52(1), (2), (3), 60(3)(b), 70(5)(a)

Strata Titles (Federal Territory Of Kuala Lumpur) Rules 2019, Schedule 2

Strata Titles Act 1985, ss. 4, 13(2), 17, 18, 34(2), 41A(1), 45(3)(b), 46, 69

(Civil Appeal No: W-02(NCVC)(W)-1890-10-2021)

For the appellant - Cyrus Das, Sivabalan & Goh Wan Ping; M/s Mastura Partnership

For the respondent - Kamarul Hisham Kamaruddin & Loke Pooi Gee

(Civil Appeal No: W-02(NCVC)(W)-1929-10-2021)

For the appellant - Andrew Davis, Zaitul Naziah Mohd Soib & Anne Raj; M/s Andrew Davis & Co

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[Editor's note: For the High Court judgment, please see Target Term Sdn Bhd v. Waldorf And Windsor Management Corporation; Malaysia Land Properties Sdn (Intervener/ 2nd Defendant In Counter Claim) [2021] CLJU 2505; [2021] 1 LNS 2505 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan JCA:

Introduction

[1] There are two appeals before the court. The appellant in Appeal No. 1929 is Malaysia Land Properties Sdn Bhd (referred to here as "Mayland"). It was the developer of a mixed development complex in Taman Sri Hartamas, Kuala Lumpur, within which were comprised the Waldorf & Windsor Towers apartments. In 2009, Mayland entered into a sale and purchase agreement (the "SPA") to sell to Target Term Sdn Bhd ("Target Term") one of the apartment units, unit B-21-03. The sale included 420 carpark units.

[2] Even though on paper Target Term did not appear as being owned by Mayland, before us in the appeal, the counsel for Target Term and Mayland conceded that they were related corporations. By this, we understood that both companies were controlled by the same ultimate beneficial owner. Target Term is also the appellant in Appeal No. 1890.

[3] It was not in material dispute that the intent of the sale to Target Term of the single apartment unit together with the 420 carpark units was in furtherance of a plan for Target Term to undertake a commercial carpark business. The strata title to unit B-21-03 was issued to Target Term on 19 March 2018. In the strata plan, 414 carpark units have been accessorised to the parcel identified as unit B-21-03.

[4] The respondent in both appeals is Waldorf and Windsor Management Corporation, referred to in this judgment as the "MC". It is the management corporation in respect of the Waldorf & Windsor Towers, established under the Strata Management Act 2013.

[5] In 2017, the MC billed Target Term for arrears in management charges and sinking fund contributions amounting to over RM850,000. This prompted Target Term to sue the MC in June 2017. It sought, among others, for a declaration that the back charges were null and void. Target Term's pleaded position was that the MC had not provided any maintenance services in respect of the carkpark accessory parcels, and that all maintenance and other charges (such as electricity, security and cleaning costs) had been borne by Target Term.

[6] In response, the MC raised a counterclaim against Target Term and against Mayland. It sought to defeat the title of Target Term to the accessory parcels on the basis that (among others) the SPA contravened the applicable provisions of the Strata Titles Act 1985.

[7] The High Court dismissed the claim of Target Term in the main action, and allowed the counterclaim, declaring (among others) that the sale and purchase agreement for unit B-21-03 entered into between Target Term and Mayland was null, void and unenforceable and that the 414 carpark units were not accessory parcels but were in fact and law common property.

[8] In coming to this decision, the High Court (among others) held that:

(i) the use of the 414 carpark parcels in the commercial carpark business undertaken by Target Term contravened ss. 34(2) and 69 of the Strata Titles Act 1985; and

(ii) the provisions of the Strata Titles Act 1985 require an accessory parcel to be used in conjunction with the parcel to which they have been accessorised (B-21-03), and since they are not used in conjunction with unit B-21-03, this illegality defeated the title of Target Term to the carpark parcels, which in turn meant that the carpark units were common property within the meaning of Strata Titles Act 1985.

The Strata Titles Act 1985

[9] Section 34 of the Strata Titles Act 1985 provides for the rights of a proprietor of a strata title. Subsection (2) prohibits independent dealing of an accessory parcel, and reads as follows:

> (2) No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant.

[10] This proscription is repeated in s. 69, which contains an express reference to the strata plan:

> Section 69. No dealing in accessory parcel independent of a parcel.
>
> No accessory parcel or any share or interests therein shall be dealt with independently of the parcel to which such accessory parcel has been made appurtenant as shown on the approved strata plan.

[11] The definition of "accessory parcel" in s. 4 is set out as follows:

> "accessory parcel" means any parcel shown in a strata plan as an accessory parcel which is used or intended to be used in conjunction with a parcel;

[12] In coming to the decision that the carpark units were not accessory parcels but were common property, the High Court placed heavy reliance on the Court of Appeal case of *Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal*[1].

[13] In that case, the first defendant in the original action, Ideal Advantage Sdn Bhd, had purchased 45 condominium units from the developer, Muafakat Kekal Sdn Bhd, the second defendant. The purchase was recorded in 45 separate sale and purchase agreements. Ideal Advantage also bought

439 accessory carpark parcels. Five condominium units had only one carpark parcels made appurtenant to them, while the remaining 40 condominium units each had between eight to 15 accessory carpark parcels.

[14] Ideal Advantage operated a commercial carparking business with the 439 carpark parcels.

[15] The Court of Appeal held that:

(i) the use of the carpark parcels in a commercial enterprise was a use that was independent and separate from the use of the main parcels to which the carpark parcels were appurtenant;

(ii) the letting out of the carpark units constituted a "dealing" for the purposes of the Strata Titles Act 1985, and therefore the letting out of 394 carparks by Ideal Advantage (439 carpark units minus 45 condominium units) constituted a dealing that was prohibited by ss. 34(2) and 69 of the Strata Titles Act 1985.

[16] In relation to the meaning of the phrase "dealt with" as used in ss. 34(2) and 69 of the Strata Titles Act 1985, the Court of Appeal held as follows:

> [47] D1 and D2 alleged that the learned trial judge erred in law and fact when he failed to appreciate the words 'dealing' and 'dealt with' in the NLC and ss. 34(2) and 69 of the STA 1985 do not include 'tenancy' which cannot be registered.
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> [48] On this issue, we refer to the provisions of s. 5 of the NLC which defines 'dealing' as follows:
>
> > 'dealing' means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order;
>
> Section 205 of the NLC provides that:
>
> > (1) The dealings capable of being 'effected' (as opposed to 'registered') under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others.
>
> A transaction under 'Division IV' of the NLC includes Part 15 of the same which has provisions on 'Tenancy' under ss. 223-224. Part 14 of the NLC also deals with 'transfer exempt tenancies' pursuant to s 220 of the same.
>
> [49] Therefore, by plain and unambiguous language, the term 'dealing' in the NLC includes 'tenancy'. This definition is imported into the STA 1985, where the word 'dealt with' appears in ss. 34(2) and 69 of the STA 1985. These provisions are to be read together with ss. 5(1) and 5(2) of the STA 1985 which provide:

> 5(1) This Act shall be read and construed with the National Land Code as if it forms part thereof.
>
> (2) The National Land Code and the rules made thereunder, in so far as they are not inconsistent with the provisions of this Act or the rules made thereunder, or are capable of applying to parcels, shall apply in all respects to parcels held under the strata titles.
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> A reading of the aforesaid provision shows that the STA 1985 is to be read and construed as part of the NLC. The provisions of the NLC (which is not inconsistent with the STA 1985) shall apply in all respects to parcels held under the STA 1985, which includes the act of 'renting out'.
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> Section 4 of the STA 1985 utilises the words 'use' or 'intended to be used' which clearly includes the act of 'renting out' or 'tenancy' of an accessory parcel to a third party. This is consistent with the word 'dealt' or 'dealing' under the NLC.
>
> [50] The act of renting out 394 car parks by D1 independent of the main parcels, constitutes 'dealing' of the accessory parcels, which is prohibited by ss. 34(2) and 69 of the STA 1985, which includes any dealings by way of tenancies or the rental of car parks.

[17] In that case, the sub-division of the carpark parcels had not been conducted in accordance with the development order issued by MBPJ under the Town and Country Planning Act 1976. The Court of Appeal took this into consideration when it concluded that the initial sale of 40 of the 45 condominium units was unlawful and void, holding as follows:

> [69] D1 in its memorandum of appeal alleges that the learned trial judge erred in law and fact when His Lordship failed to consider that the usage of the car parks by D1 was subsequent to the transaction between D1 and D2, therefore D1's intention to purchase the car parks cannot be accepted as a ground to declare the SPAs between D1 and D2 to be illegal.
>
> [70] Clearly that proposition cannot stand premised on the DO, the Town and Country Planning Act 1976 and the plain and ordinary meaning of the provisions of the STA 1985. The plain meaning of the provisions of the STA 1985 supports the purpose and objective of the statute in protecting the interest of the residents and owners of the parcel units of the condominium. Any consideration for the alleged sale of the car parks under the 40 SPAs are therefore unlawful pursuant to s. 24 of the Contracts Act 1950 which reads:
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> 24 The consideration or object of an agreement is lawful, unless:
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> (a) it is forbidden by law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) ...
>
> (d) ...
>
> (e) the court regards it as immoral, or opposed to public policy.

> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
>
> As the intention of the sale of the accessory car park parcels is to defeat the STA 1985, the 40 SPAs are therefore unlawful and consequently void (in so far as 394 perimeter car parks are concerned).
>
> [71] Therefore the learned trial judge did not err when he found that the sale of the accessory car parks are illegal and falls within s. 24(b) of the Contracts Act 1950.

[18] The Court of Appeal in *Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal* did not have the benefit of considering the subsequent Federal Court decision in *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation*[2].

[19] In *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation*, the management corporation of a condominium sued 20 proprietors of apartments in the condominium for letting out their units in short-term rental arrangements procured through online booking platforms such as Airbnb, booking.com and Agoda. A general meeting of the management corporation had passed a resolution to pass a new house rule that prohibited the use of apartment units for business purposes, including for short-term rentals effected through online booking service providers. The defendants (who were the appellants before the Federal Court) argued that the new house rule contravened s. 70(5) of the Strata Management Act 2013, the material portion of which read as follows:

> (5) No additional by-law shall be capable of operating:
>
> (a) to prohibit or restrict the transfer, lease or charge of, or any other dealing with any parcel of a subdivided building or land; and
>
> (b) to destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985.

[20] The position of the defendants was that the short-term rentals constituted a "dealing" for the purposes of s. 70(5)(a), and hence their rights to let their apartment units out could not lawfully be curtailed by the new house rule.

[21] The Federal Court found that the arrangements in question were no more than mere licences and did not amount in law to "dealings" for the purposes of s. 70(5) of the Strata Management Act 2013. Accordingly, the new house rule did not have the effect of contravening s. 70(5).

[22] Speaking for the Federal Court, Tengku Maimun CJ summarised the applicable test to distinguish a tenancy from a licence in the following terms:

> [T]he following principles may be distilled from the English and Malaysian cases pre *Street v. Mountford* [1985] AC 809 and read together with *Street*, on the test to distinguish between a tenancy and a licence:

(a) courts must first ask whether there is proof that the owner of the premises granted the occupier the right to exclusive possession of the premises. If the occupier can prove that he enjoys exclusive possession, then it is highly likely that the arrangement is a tenancy and not a licence. It would be for the other side, namely the grantor, to prove exceptional circumstances that despite the grant of exclusive possession to the occupier, parties did not intend to establish a tenancy;

(b) where the occupier is not conferred or is unable to establish that he has exclusive possession of the premises, the court must nonetheless determine the nature and quality of the occupancy. This includes analysing the terms of any written or oral agreement between parties as to whether they intended for the nature and quality of the occupancy to be more consistent with the rights of an occupier under a tenancy;

(c) 'intention' or 'nature and quality' here refer to specific indicators such as whether parties intended the occupier to have certain rights and obligations which are consistent with that of a tenant under tenancy laws - including but not limited to control of rent, and other relevant protections sufficient to create an interest in the land;

(d) where there is no proof of exclusive possession and there is not manifest any intention that the nature and quality of the occupancy do constitute a tenancy, it would be appropriate for the court, in those circumstances, to conclude that the arrangement was intended to be merely a licence and not a tenancy;

(e) whatever labels parties use to describe their arrangement or the occupancy, for example, 'lease', 'tenancy' or 'licence' is relevant in the determination of their intention and the nature and quality of the occupancy, but is neither decisive nor conclusive. Accordingly, courts and judges must be mindful of the peculiar facts and circumstances of each and every case that comes before them; and

(f) in each and every case, particular emphasis needs to be paid to the substantive obligations parties have under the agreement, whether written or oral, and not so much the language and labels they ascribed to the words. This is important because unscrupulous parties might attempt to disguise the true nature of their agreement by bending the language they use to disguise it as one form of occupancy over another.

[23] Applying this test to the facts of the present case, we are under no doubt that the permission granted to a driver of a motorcar to enter into, and park in, the area designated as a carparking area for visitors would constitute no more than a licence and cannot be construed as a tenancy. While the driver is given permission, at the point of entry, to park his car in any available parking lot, that parking lot is not identified at the point of contract formation. It is only when he parks his car that the lot becomes identified. In this sense, he is not given exclusive possession of any parking lot upon

his entry. Of course, once he had made his selection, no other motorcar may be parked in the parking lot so chosen, but this does not mean that other persons are prohibited from entering into the rectangular space marked out by the parking lot lines. Another person parking in an adjacent carpark lot, for example, may need to open her car door in a manner that will encroach into his chosen carpark lot. In any event, it is clear beyond peradventure that the contractual relationship between Target Term as the operator of the carpark and its customers was not intended to confer upon the latter rights and obligations consistent with those of tenants under tenancy laws.

[24] The learned judge in the court below considered the Federal Court decision in *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation*, but elected to follow the decision in *Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal* on the basis that the latter case dealt specifically with ss. 34(2) and 69 of the Strata Titles Act 1985. The High Court stated as follows:

> With respect to the Plaintiff's counsel, *Innab Salil*'s case only deals with s. 70(5) of the SMA and not with sections 4, 34(2) and 69 of the STA where the Federal Court clearly stated that its interpretation of dealing is for the purposes of s. 70(5) of the SMA ...

[25] While is it is true that *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* dealt with s. 70(5) of the Strata Management Act 2013, nonetheless the principles laid down by the Federal Court to distinguish between tenancies and licences are of general application. When those principles are applied to the facts of the present case, the inescapable conclusion must be that the carpark customers are mere licensees and not tenants.

[26] In coming to this conclusion, we consider ourselves bound by the subsequent decision of the Federal Court in *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation*. We are of the view that this decision has the effect of impliedly overruling the earlier decision of the Court of Appeal in *Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal*, in so far as it pertains to the true construction of the contractual relationship between a carpark customer and its operator.

[27] It therefore follows that the construction of carpark rentals as a "dealing" cannot be correct. The cognate expression "dealt with" in ss. 34(2) and 69 of the Strata Titles Act 1985 does not encompass the act of granting licences for temporary occupation to carpark customers.

[28] For these reasons, we are of the view that the act of operating a commercial carpark business on the accessory parcels does not constitute dealing in those accessory parcels, and accordingly does not contravene the statutory prohibition in ss. 34(2) and 69 of the Strata Titles Act 1985 against independent dealing of accessory parcels.

[29] We are of the further view that accessory parcels constituted by the 414 carpark units cannot metamorphose into common property. In the Strata Titles Act 1985, common property is defined in s. 4 in the following manner:

> "common property" means so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan;

[30] The term common property is thus defined by way of exclusion in the Strata Titles Act 1985. Common property is that which is not identified as a parcel in the strata plan.

[31] The expression "accessory parcel" is in turn defined in s. 4 of the Strata Titles Act 1985 in the following manner:

> "accessory parcel" means **any parcel shown in a strata plan as an accessory parcel** which is used or intended to be used in conjunction with a parcel;
>
> (emphasis added)

[32] In this case, the certified strata plan that has been exhibited in evidence clearly shows the 414 carpark units being identified as being accessory parcels. Accordingly, once they have been identified as accessory parcels, they cannot in law be construed as common property.

[33] Much has been said by the counsel for the respondents of the phrase "which is used or intended to be used in conjunction with a parcel". We were urged to conclude that, if the accessory parcel has not been used or was not intended to be used with the parcel to which it is appurtenant, then that accessory parcel loses its characterisation as a parcel and becomes subsumed into the common property of the building.

[34] We are unable to agree with this conclusion. First, nowhere in the Strata Titles Act 1985 is this legal consequence provided. Second, it is a fundamental rule of drafting (and consequently of construction) that definitions are not to contain the operative provisions of written law. If rights and obligations are intended to be created or annulled by a provision of law, then it must be set out in the body of the legislation. For this reason, we are of the considered view that the phrase "an accessory parcel which is used or intended to be used in conjunction with a parcel" simply refers to an accessory parcel that has been made appurtenant to a parcel.

The Development Order

[35] It will be recalled that in the case of *Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal*, it was held that there had been contravention by the developer of the terms of the development order. This was one of the factors taken into account by the Court of Appeal to conclude that the sale of the carpark units in that case had been tainted with illegality.

[36] The present case is distinguishable on its facts.

[37] The initial terms of the development order dated 20 June 2002 issued to Mayland's architect imposed a condition that there be 700 carpark units. The subsequent development order issued on 27 September 2005 increased the requirement for carparks to 797 units. A re-amended development order was issued on 26 March 2008, which did not impose any requirement for any increase in the number of carparks, but reiterated the need for adequate carparks within the development area.

[38] The development orders issued in this case did not specify any breakdown between the carpark units to be made available for residents and for visitors. Nor was there any requirement imposed on the number of carpark units that were to be made appurtenant to a parcel. Furthermore, there was no suggestion by the evidence on record that the number of carpark units was insufficient either for the use of residents or visitors.

[39] There was thus no contravention in the present case of the terms of the development orders. Even if breach of the terms of a development order regarding the allocation of carpark units could have the effect of invalidating the title of a proprietor to those carpark units, on the facts of the present case, there was no such breach established.

[40] In their appeals, the appellants raised the question of whether the MC was possessed of sufficient *locus standi* to seek to strike down a private contract to which it was not a party. As we have allowed the appellants' appeal on the issue of the title to the accessory parcels, this issue of *locus standi* is now academic, and we see no necessity to address it in these grounds.

[41] In summary:

(i) because the act of letting out of a carpark unit as part of a business merely amounts to a licence to the carpark customer to use a unit of carpark, it does not amount to an act of dealing in the accessory parcels comprising the carpark units. For this reason, there was no contravention of the prohibition against independent dealing of accessory parcels contained in ss. 34(2) and 69 of the Strata Titles Act 1985;

(ii) on the facts of the present case, there was no contravention of the development orders that had been issued for the development of the subject building; and

(iii) as a consequence of the findings in the preceding sub-paragraphs, the SPA was not illegal or void, and Target Term's title to the accessory parcels remains unaffected.

A **Maintenance Charges And Sinking Fund Contributions**

[42] In its counterclaim, the MC claimed for back charges from 11 July 2011 for maintenance charges and sinking fund contributions that it claimed were due from Target Term. Charges prior to this date were not claimed by the MC on the basis that they were time-barred.

B

[43] In Target Term's claim in the main action, it had sought for declarations that:

(i) the back charges imposed on it by the MC for the period between 24 January 2011 and 31 December 2016 were null and void; and

C

(ii) the maintenance charge payable by it from 1 January 2017 be fixed at RM0.09 per share unit.

[44] The claim by the MC for back charges was an alternative prayer. As the High Court had ruled that the SPA was null and void and that Target Term's title to the subject property was consequently nullified, the issue of the back charges did not arise.

D

[45] With our ruling that the SPA was not null and void, the claim for the back charges now comes to the fore.

E

[46] The obligations of a proprietor of stratified property to make contributions to a maintenance account and sinking fund are governed by the Strata Management Act 2013, which came into force on 1 June 2015. Prior to this, the applicable provisions were contained in the Strata Titles Act 1985. In the following paragraphs, we outline the requirements under both Acts, as the period for which back charges were claimed spans across the two periods when the provisions of the different Acts were in force. (The management of stratified property prior to the formation of a management corporation was previously governed by the Building and Common Property (Maintenance and Management) Act 2007, but this Act is not relevant for the purposes of the issues arising in the present appeals.)

F

G *The Strata Management Act 2013*

[47] Section 52(1) of the Strata Management Act 2013 is the principal provision that creates the obligation of proprietors to make contributions to the maintenance account and sinking fund in respect of a stratified property.

H **[48]** The maintenance account is intended to be applied towards maintaining the common property and to meet the costs of the day-to-day running of the building. The specific manner in which the maintenance account may be used by a management corporation is set out in s. 50(3). By contrast, the sinking fund is to be applied to meet actual and expected capital expenditure, such as upgrading, refurbishment and the replacement of equipment: see s. 51(2). The sinking fund contribution is prescribed by s. 52(3) to be 10% of the maintenance charges.

I

[49] Under s. 60(3), a management corporation may determine the amount of maintenance charge to be raised from each proprietor in proportion to the share units held by the proprietor of a parcel. This is effected by way of a resolution passed at a general meeting of the management corporation.

[50] Where the management corporation has yet to convene a general meeting to determine the amount of maintenance charges payable, the charges will be those that were determined by the developer. A management corporation comes into existence by operation of law when the book of the strata register is opened (see s. 17 of the Strata Titles Act 1985). In the present case, it was not disputed that the MC was established on 24 January 2011. Its first general meeting was only held on 23 July 2016. Sections 12(2) and 52(2) of the Strata Management Act 2013 provide that, until a management corporation passes a resolution fixing the maintenance charges, the applicable charges will be those determined by the developer.

[51] The expression "share units" in the Strata Management Act 2013 incorporates by reference the definition of that term as defined in s. 4 of the Strata Titles Act 1985, which reads as follows:

> "share units", in respect of a parcel, means the share units determined for that parcel as shown in the schedule of share units;

[52] Under s. 18 of the Strata Titles Act 1985, the share units for a development area are to be approved by the Director of Land and Mines. Share units in respect of a development area located in Kuala Lumpur are calculated in accordance with the formula prescribed in Schedule 2 to the Strata Titles (Federal Territory of Kuala Lumpur) Rules 2019. In brief, share units are derived from the area of a parcel, but with certain weightages applied, depending on the type of parcel, and on the facilities that are available to the parcel. For a fuller explanation of the manner in which share units are calculated, see the decision of this court in *Muhamad Nazri Muhamad v. JMB Menara Rajawali & Anor* [2019] 10 CLJ 547.

The Position Prior To The Coming Into Force Of The Strata Management Act 2013

[53] Before 1 June 2015, the maintenance of a management fund by a management corporation was governed under the Strata Titles Act 1985. There was no express mention of the expression "sinking fund" under the Strata Titles Act 1985, although s. 46 provides for a special account into which a portion of the contributions to the management fund shall be paid. This special account was intended to be used to defray expenses incurred for painting the building and other capital expenditure, and for this reason could be said to be an analogous precursor to the sinking fund under the Strata Management Act 2013. The amount of contributions to be paid into this special account must be determined by way of a special resolution passed at a general meeting of the management corporation.

[54] This was a notable difference from the scheme subsequently introduced by the Strata Management Act 2013. Under the old laws, proprietors made a periodical payment into the management fund, and there was no separate contribution by the parcel owners into the special account. The amount to be set aside and paid into the special account was determined by the management corporation by way of a special resolution passed at a general meeting. Under the new laws, two separate payments were due and payable by the parcel owners: the maintenance charges (specifically, the payments into the maintenance account), and the sinking fund contributions, which are fixed by statute at 10% of the management charges.

[55] Reverting to the position prior to 1 June 2015: under the since-repealed s. 45(3)(b), the contributions to the management fund were levied on proprietors of parcels in proportion to the share units of their respective parcels. The amount to be levied must be approved at a general meeting of the management corporation. However, if a management corporation has come into existence but has not yet held its first general meeting, then the contributions payable by the parcel owners would be determined by the developer. The words of the since-deleted s. 41A(1) reads as follows:

> (1) Where the first annual general meeting of a management corporation has not yet been convened, the proprietor of the parcels or provisional blocks, if any, in the subdivided building or land, whichever is applicable shall, commencing from the opening of the book of the strata register, pay to the management corporation **any sum determined by the original proprietor as the contributions payable** by the proprietors to the management fund of the management corporation.
>
> (emphasis added)

[56] We take the expression "original proprietor" to refer to the developer.

[57] Prior to 1 June 2015, the share units were to be those set out in the schedule of share units that would be included in the certified strata plan approved by the Director of Surveys, in accordance with s. 13(2) of the Strata Titles Act 1985.

Is Target Term Liable For The Back Charges?

[58] The analysis relating to the existence and extent of Target Term's liability for back charges would be different for three separate periods:

(i) the period prior to 1 June 2015. In this period, the applicable provisions were those contained in Part VII of the Strata Titles Act 1985, which have since been repealed;

(ii) the period between 1 June 2015 and 23 August 2016, which was the period when the applicable contributions would be those determined by the developer pursuant to s. 52(2) of the Strata Management Act 2013; and

(iii) the period after 23 August 2016, when the applicable contributions ought to be those approved by the MC in general meeting. However, as we shall see, an important issue arises on the ability of the MC to impose charges otherwise than on the basis of share units.

[59] The claims for back charges relating to each of these three periods are addressed in turn in the following paragraphs.

[60] For the period prior to 1 June 2015, Target Term would be liable to pay contributions to the management fund. There was, however, no separate obligation on it to pay sinking fund contributions, for the reasons explained at para. [54] *ante*. It was not disputed that the management fund contributions prevailing prior to the first general meeting of the MC had been determined to be RM0.31/ft^2, plus RM25 for each carpark parcel. It may thus be deduced that this was the rate that had been fixed by Mayland as the developer, pursuant to s. 41A(1) of the Strata Titles Act 1985, reproduced at para. [55] *ante*.

[61] Although the management fund contributions that were to be fixed by the management corporation must be levied on proprietors in accordance with the share units held by the proprietors, that was not the case for management fund contributions determined by the developer pursuant to s. 41A(1). Section 41A(1) did not expressly require management fund contributions to be payable in accordance with the share units held by the proprietors.

[62] If s. 41A(1) is examined carefully, nowhere does the provision state that the sum determined by the developer as contributions to the management fund must be reckoned by reference to the share units held by the proprietors. This is to be contrasted with the contributions to the management fund that were to be fixed by the management company under the now-repealed s. 45 of the Strata Titles Act 1985, sub-s. 3(b) of which makes express reference to contributions being levied on the basis of share units held.

[63] For the period commencing from 1 June 2015, proprietors would have to make two contributions: they have to pay the charges to be paid into the maintenance account, and secondly, they have to pay contributions into the sinking fund, which is set at 10% of the maintenance charges.

[64] As explained above, where the management corporation has yet to fix the applicable maintenance charges at its general meeting, the charges will be those determined by the developer. The relevant provision is s. 52(2) of the Strata Management Act 2013, which reads as follows:

> (2) During the preliminary management period, the amount of the Charges to be paid under subsection (1) shall be determined by the developer in proportion to the share units assigned to each parcel.

[65] The expression "preliminary management period" is defined in s. 46:

> "preliminary management period" means the period commencing from the date of delivery of vacant possession of a parcel to a purchaser by the developer until one month after the first annual general meeting of the management corporation;

[66] The first general meeting of the MC was held on 23 July 2016. There was thus an obligation on the parcel owners to pay the maintenance charges for the period between 1 June 2015 until 23 August 2016 (being the date one month after the first annual general meeting of the MC). Under s. 52(2) of the Strata Management Act 2013, the charges ought to have been determined by the developer by reference to the share units held, but, as we have seen, the charges had in fact been imposed on the basis of square footage. The obligation to impose charges on the basis of share units in fact and law lay with Mayland, as the developer. We are of the view that it would not be just to deprive the MC from its legal entitlement by reason of a default of the developer, and we accordingly hold that Target Term is liable to the MC for:

> (a) contributions to the maintenance account for the period between 1 June 2015 and 23 August 2016 at a rate of RM3.4045 per share unit; and
>
> (b) contributions to the sinking fund for the same period at the statutorily prescribed rate of 10% of the maintenance charges.

[67] The rate of RM3.4045 per share unit is derived in the following manner. The rate that had been set by Mayland was RM0.31/ft^2. Thus, for the apartment unit B-21-03 only (which was 1,230ft^2 in area), the maintenance charge would have been:

1,230ft^2 × RM0.31 = RM381.30

The apartment unit B-21-03 comprised 112 share units. Thus, the maintenance charge per share unit would be:

RM381.30 ÷ 112 share units = RM3.4045 per share unit

The total share units for B-21-03 together with its 414 carpark accessory parcels is 5131, which meant that the total maintenance charge would be:

RM3.4045 × 5,131 share units = RM17,468.50

[68] For the period after 23 August 2016, we are of the considered view that the MC would not be entitled to the back charges for the maintenance charges and sinking fund for as long as it has not passed a resolution at a general meeting that conforms to the requirements set out in s. 60(3)(b) of the Strata Management Act. Section 60(3) reads as follows:

> (3) Subject to s. 52, for the purpose of establishing and maintaining the maintenance account, the management corporation may at a general meeting:

(a) determine from time to time the amount to be raised for the purposes mentioned in subsection 50(3);

(b) raise the amounts so determined by imposing Charges on the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks, and the management corporation may determine different rates of Charges to be paid in respect of parcels which are used for significantly different purposes and in respect of the provisional blocks; and

(c) determine the amount of interest payable by a proprietor in respect of late payments which shall not exceed the rate of ten per cent per annum.

[69] This provision is clear in that the MC would only be permitted to impose charges for the purposes of the maintenance account if those charges are imposed in proportion to the share units or provisional share units held by the respective proprietors. While the subsection permits the MC to impose different rates of charges, it does not permit the MC to impose charges on any basis other than share units or provisional share units. The rate of RM0.31/ft^2 previously fixed cannot be charged, because this rate would only be applicable in respect of the preliminary management period, in accordance with s. 52(2) of the Strata Management Act 2013.

[70] It would appear to us that one course of action open to the MC would be to immediately convene a general meeting to pass a resolution that complies with s. 60(3), and thereafter to claim for arrears of contributions so determined to the extent that such claims are not barred by limitation. We express no view as to the legality or correctness of such a claim, as this is not an issue that is currently before us.

[71] The liability of Target Term for the back charges is summarised in the following table:

11 July 2011 to 31 May 2015	*1 June 2015 to 23 August 2016*	*From 24 August 2016 onwards*
• RM0.31/ft^2 in respect of Unit B-21-03 • RM25 per car park parcel for each of the 414 accessory parcels	• RM3.4045 per share unit for maintenance charges • RM0.34045 per share unit for sinking fund contribution	None, for as long as charges have not been imposed on the basis of share units

[72] It will be recalled that, in support of its prayer for a declaration that the back charges were null and void, Target Term contended that the MC had not provided any maintenance services in respect of the cark park accessory parcels, and that all maintenance and other charges (such as electricity, security and cleaning costs) had been borne by Target Term.

[73] We are of the view that Target Term would not be permitted to circumvent a liability that has been imposed by statute. There is nothing in the scheme of the applicable legislation to suggest that a proprietor and a

A management corporation can contract out of the obligations imposed by written law. For this reason, the contention by Target Term that it had undertaken its own maintenance of car park accessory parcels does not obviate its liability to pay for the charges that have been imposed under the Strata Titles Act 1985 and under the Strata Management Act 2013.

B **[74]** Where, however, a management corporation has refused to provide maintenance services when it is legally obliged to do so, it would be open to a proprietor to seek legal redress to compel the management corporation to provide such services. In addition, if the management corporation has refused to provide maintenance services and a proprietor has incurred costs
C in engaging a third-party contractor to perform such services, it would appear to us that such costs would be recoverable from the management corporation. In the present case, Target Term only sought for declaratory relief, which it is not entitled to for the reasons explained in the preceding paragraph.

D **[75]** There are accordingly orders as follows:

(i) the appeals of Target Term and Mayland in Appeals No 1890 and 1929 are allowed in part, to the extent that paras. 3 to 18 and 20 to 21 of the order of the High Court dated 21 September 2021 are set aside;

(ii) the cross appeal of the MC in Appeal No. 1929 for general and
E exemplary damages is dismissed;

(iii) Target Term to pay to the MC the excess of the back charges set out in para. [71] of these grounds of judgment over the amounts actually paid;

(iv) Target Term to pay pre-judgment interest on the sum of the amounts
F referred to in para. (c) (the "principal judgment amount") at a rate of 5% per annum, from 14 June 2016 until today; and

(v) Target Term to pay post-judgment interest on the sum of the principal judgment amount and the pre-judgment interest at a rate of 5% per annum from tomorrow until full satisfaction.

G **[76]** We further order costs of RM100,000 here and below in favour of Target Term and Mayland, such costs to be subject to an allocatur.

Endnote:

1. *Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring*
H *@ Damansara & Another Appeal* [2019] CLJU 894; [2019] 1 LNS 894; [2020] 4 MLJ 93.

2. *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285; [2020] 12 MLJ 16.

I